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Case No. 86-1092

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

CITY OF CAPE GIRARDEAU, MISSOURI,
Petitioner,

v.

WESTBOROUGH MALL, INC.,
GEORGE STAPLES, JR.,
and WESTBOROUGH MALL ASSOCIATES,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner seeks review of the decision of the Eighth Circuit which remanded this case for a new trial because of prejudicially erroneous and misleading jury instructions. The petition curiously ignores that opinion and the present posture of this case. The Eighth Circuit's decision announced no new legal principles nor did it depart from well-settled standards in reviewing and reversing the verdict below. Rather, the Appellate Court determined that a number of the jury instructions given were prejudicially erroneous and misleading, requiring a new trial.

Conspicuously absent from the City's petition is any discussion of error on the part of the Appellate Court. Instead, the City is asking this Court to consider what

might happen if evidence at the new trial is solely as the City wishes it to be and if jury instructions that petitioner might offer are rejected. When the City's failure to find fault with the Eighth Circuit decision is coupled with the factual distortions in the City's statement of the case, it becomes apparent that a writ of certiorari is not warranted.

The foundation for the City's entire petition, and the basis for its criticism of what the Eighth Circuit decision might permit, is its argument that the City Manager merely voiced a mistaken opinion as to respondents' shopping center zoning. This factual issue should be submitted to a jury, not to the Supreme Court. Furthermore, the City's portrayal of the facts grossly distorts undisputed evidence of its official actions based upon City documents and the testimony of City officials.

The City's argument also ignores the presence of a jury question as to whether there was a conspiracy between City officials and the developers of a competing shopping center. Obviously, the City's characterization of the official actions as a single, random, unauthorized mistake cannot be accepted where there is evidence that the City acted in furtherance of a conspiracy with competing developers.

STATEMENT OF THE CASE

The City's statement of the case presents a glaringly one-sided and misleading portrayal of the evidence. The Eighth Circuit's discussion of the facts is more accurate and reliable. (See Appendix A at A-3 to A-6.) However, because of petitioner's oft-repeated clamor that all that happened was an unauthorized mistaken opinion offered to the media by the city manager, respondents believe that a discussion of the evidence of the City's official actions would be helpful.

This case is about petitioner's actions which deprived respondents of their constitutionally protected property interests. After respondents obtained zoning approval to build a shopping center and spent more than one million ($1,000,000.00) dollars on site preparation and pre-leasing activities in reliance on their shopping center zoning, the City, without notice, reverted respondents' zoning to prior classifications. This resulted in a three million ($3,000,000.00) dollar depreciation in the value of the property and prevented respondents from being able to either develop or sell the property.

On April 6, 1979, after a special meeting of the city council attended by the city manager and the city attorney to discuss the issue (Tr. 3:42-43), the city manager and other City officials told a local television station that respondents' Westborough Mall site was no longer zoned for a shopping center development. (Tr. 3:40-41, Ex. 1136) Following this announcement, the city manager, who is the chief executive officer of the City of Cape Girardeau responsible for the administration of city government, enforcement of city ordinances, and supervision and control of city employees (Tr. 3:13, 8:91), prepared a memorandum to the city engineer directing him to carry out the reversion of respondents' zoning (Tr. 3:44, Ex. 1141).

The city manager discussed this memorandum with the city attorney, with special counsel, and with members of city council. (Tr. 3:47, 3:52) The city manager testified that his authority to issue instructions to the city engineer to change the master zoning map, which is an integral part of the zoning ordinance and the official record of the City's zoning district (Tr. 3:15), was based on the City's zoning code, specifically the reverter clause in Section 30-31(e), as well as his duty to supervise the engineering department and the city manager's statutory obligation to enforce all ordinances. (Tr. 3:50-51)

The memorandum directed the city engineer to mark the City's master zoning map to reflect the zoning that existed prior to when the C-4 zone was established and ordered that no building permits be issued or renewed for mall construction on this site. (Ex. 1141) Pursuant to this memorandum, the City's master zoning map was changed to reflect the reversion of respondents' zoning. (Tr. 3:53, 7:138, Ex. 2459)

On April 13, 1979, the city manager prepared a study session report, a formal device used to communicate with the city council (Tr. 3:14), indicating that he had instructed the City Engineering Department not to issue building permits for Westborough Mall construction and that:

> "Until instructed otherwise by the City Council or a Court of proper jurisdiction, the City Manager intends to apply provisions of this section [30-31 of the City Zoning Code] to the Westborough Mall property." (Tr. 3:53, Ex. 1146)

The study session report was given to each of the council members (Tr. 3:56) and was discussed at the city

council's April 17, 1979 study session. (Tr. 3:54-56) With full knowledge, Council allowed the zoning reverter to stand for more than a year and a half during which time a competing shopping center was built and the window of opportunity for Westborough Mall closed. Only then did Council adopt an ordinance correcting the reverter and reaffirming respondents' shopping center zoning because all along it had been exempt from the reverter provision, Section 30-31(e) of the City zoning code. (Tr. 3:61-63, 6:49-50, 8:59, 8:79) This was too little, too late.

REASONS FOR DENIAL OF WRIT

It is evident from the very opening of petitioner's argument that the City is concerned with how the facts in this case should be viewed. A writ of certiorari should not be granted "merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp.* v. *Western Electric Co.*, 304 U.S. 175, 178 (1938); *Southern Power Co.* v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924).

More significantly, given the present posture of this case, a review of what the evidence may or may not show is certainly premature. The Eighth Circuit has now twice concluded that respondents' evidence could support a claim for damages under 42 U.S.C. § 1983. It is appropriate for a jury, after proper instructions, to weigh the evidence and reach a verdict. Given the Eighth Circuit's conclusion that "[r]easonable persons could arrive at different conclusions in this case" (A-18), there is no reason to grant a writ of certiorari.

In addition, petitioner's failure or inability to even suggest how the appellate court's opinion is erroneous or reversible indicates that a writ of certiorari is not in order. Petitioner merely claims that the Court of Appeals decision "permits" three possible outcomes. (See Petition at 6, 10 and 11) Clearly, the petitioner's concerns can be allayed if the City offers appropriate jury instructions on remand. Thus, there is simply no benefit from a review by the Supreme Court here.

I. RESPONDENTS DO NOT CLAIM A RIGHT TO DAMAGES BASED UPON SOME RANDOM, UNAUTHORIZED NEGLIGENT MISTAKE.

Petitioner argues that *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and its progeny bar any claim for relief by respondents. That argument, however, fails to confront respondents' actual claim of abuse of power and of deliberate and intentional conduct. The evidence adduced at trial indicates that virtually every high-ranking city employee was involved in the decision to revert respondents' zoning. The city attorney, as well as its special counsel (who continues to represent petitioner here), along with the city manager and city council, were involved throughout this decision-making process. (Tr. 3:43, 3:47) There were several council meetings (Tr. 3:42-43, 3:54-56), official reports and memoranda by the city manager to council and the city engineer (Tr. 3:14, 3:44, 3:53, Ex. 1141, Ex 1263), and, of course, numerous discussions. (Tr. 3:42, 5:52, 3:58-60) On each occasion the decision was made to apply the City's automatic reverter clause, Section 30-31(e) of the zoning code, to respondents' property without notice or hearing.

This court has held in *Parratt* v. *Taylor*, 451 U.S. 527 (1981), and *Hudson* v. *Palmer*, 468 U.S. 517 (1984), that inadvertent as well as intentional but random unauthorized acts cannot form the basis for a due process claim (where a post-deprivation remedy is available) because it is impractical to provide a pre-deprivation hearing. This is because it is impossible to predict, in such a situation, when the loss will occur and thus post-deprivation remedies are constitutionally sufficient. On the other hand, in *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), this court held that post-deprivation remedies do not sat-

isfy due process where the deprivation is caused by established state procedure, rendering the loss predictable.

Daniels v. *Williams*, 474 U.S. ____, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986), and *Davidson* v. *Cannon*, 474 U.S. ____, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986), do not alter these principles. Due process applies to "*deliberate* decisions of government officials to deprive a person of life, liberty or property." *Daniels*, *supra*, 106 S.Ct. at 665 (emphasis in original). However erroneous the City's actions may have been here, the officials clearly acted deliberately and intentionally to take away the zoning which permitted construction of respondents' shopping mall. This was not some random, unauthorized event, but rather an official course of action knowingly adopted pursuant to an established procedure, Section 30-31(e) of the zoning code, with the blessings of the City's chief executive officer, its legislative body, and the City's legal advisors.

After having accomplished exactly what they sought in exercising the reverter of the zoning, without notice and hearing, the City should not be permitted to escape responsibility for a harm deliberately done simply by now saying, "Oops, we made a mistake."

II. A POST-DEPRIVATION REMEDY IS NOT SUFFICIENT WHERE A PREDEPRIVATION HEARING WOULD BE PRACTICAL AND MEANINGFUL.

Petitioner claims it cannot understand how it could have possibly given respondents a hearing before reverting the zoning. The City's zoning code, Section 30-31(e), itself permitted and authorized an automatic reverter without notice and a hearing. This provision was the stated basis for the City's action. (Tr. 3:50-51) Clearly, notice and a hearing prior to the reversion should have been required by the City.

The evidence here indicates the City had ample opportunity to give respondents notice and a hearing prior to the deprivation of their zoning rights. The City held numerous informal discussions as well as several formal meetings of council, i.e. hearings, in which respondents' rights were decided, without respondents being given notice or an opportunity to be heard.

Nor can it be said that respondents "sandbagged" the City, somehow surprising the City with what had been done wrong. As it was, respondents did not discover the official actions taken by the City until respondents' financier received from the city manager a copy of the zoning code and altered zoning map indicating the reverted zoning status of the propery. (Ex. 1263) The City *never* gave respondents notice or afforded them an opportunity to be heard. (Tr. 4:46, 6:72-73)

III. RESPONDENTS SUFFERED A CONSTITUTIONAL DEPRIVATION AND SUBSTANTIAL DAMAGES DUE TO THE CITY'S DUE PROCESS VIOLATION.

Petitioner argues that respondents suffered no constitutional deprivation because the city manager merely voiced an erroneous opinion. More than that occurred; the City's master zoning map, its official record of zoning districts (Tr. 3:15), was changed and sent to respondents' financier. In addition, City officials, both publicly and privately, stated that respondents' zoning had reverted. These actions prevented respondents from being able to either develop or sell their property (Tr. 5:120, 6:75) and caused a three million ($3,000,000.00) dollar depreciation in the value of the property. (Tr. 7:45) The Eighth Circuit recognized that such facts support a finding of a constitutional deprivation. As that court noted, "the deprivation of a constitutional right does not depend on form." (A-10)

Respondents are entitled to the protections of due process upon a showing of a legitimate claim of entitlement created under state law. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Due process thus attaches where "a significant property interest is at stake." *Fuentes* v. *Shevin*, 407 U.S. 67, 87 (1972). Respondents' shopping center zoning and their exemption from the automatic reverter provision certainly created just such a constitutionally protected property interest. More generally, Missouri has recognized the right of a property owner to rely on existing zoning. *Allen* v. *Coffel*, 488 S.W.2d 671, 678-79 (m.o. 1972); *Murrell* v. *Wolff*, 408 S.W.2d 842, 852 (1966); *Burns* v. *City of Des Peres*, 534 F.2d 103 (8th Cir. 1976).

This court stated in *Fuentes* v. *Shevin*, *supra*, 407 U.S. at 87:

> "[t]he right to be heard does not depend upon an advance showing that one will surely prevail at the hearing." See also *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978).

Petitioner argues that respondents suffered no deprivation because the city manager was wrong in declaring the property reverted and changing the master zoning map. However, the magnitude of the City's wrongful conduct cannot defeat respondents' constitutional claim. That respondents would have prevailed at a hearing, if that in fact is what petitioner intends to imply in its argument, is no reason to deny their right to that hearing. The City's ordinance, adopted a year and a half after the reverter, "reaffirming" respondents' shopping center zoning, is sufficient evidence that respondents have been deprived of a constitutionally protected property interest. As the Eighth Circuit noted:

> From April 1979, to September 1980, [respondents] were effectively deprived of their C-4 classification." A-10, quoting *Westborough Mall, Inc.* v. *City of Cape Girardeau*, 693 F.2d 733, 741 (8th Cir. 1982), cert. denied 461 U.S. 945 (1983).

CONCLUSION

The City has pointed out no error by the Court of Appeals and has raised no issue warranting review. If, on remand, there is evidence supporting the City's concerns, proper jury instructions would protect petitioner's interests. Therefore, the writ of certiorari should be denied.

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